

GIBSON, DUNN & CRUTCHER LLP
RANDY M. MASTRO
NANCY E. HART
200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
*Attorneys for Defendants William
Schwitzer, William Schwitzer &
Associates, P.C., Giovanni C. Merlino,
Barry Aaron Semel-Weinstein, and Beth
Michelle Diamond*

TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	STATEMENT OF FACTS	5
III.	ARGUMENT	6
A.	Dismissal Is Required Where No Factual Allegations Are Made That State a Claim.	6
B.	Ginarte's Tortious Interference with Contract Claim Is Irreparably Flawed and Should Be Dismissed	6
C.	Ginarte's Claim Under Judiciary Law § 487 Must Be Dismissed Because the Claim Is Not Pledged with Particularity and Because Ginarte Was Not a Party to Any Relevant Judicial Proceeding at the Time of the Alleged Misconduct.....	10
D.	Ginarte Fails to State a Claim for Defamation Because the Claim Is Not Pledged with Particularity and the Alleged Statements Are Figurative and Hyperbolic.	11
1.	Ginarte Does Not Plead Who Made the Alleged Statements, to Whom They Were Made, or When They Were Made.....	12
2.	Ginarte Pleads Only Paraphrased Versions of the Alleged Statements.....	13
3.	The Alleged Statements Constitute Opinion or Loose, Figurative, or Hyperbolic Statements—None of Which Are Actionable.	14
E.	Ginarte's Unfair Competition Claim Fails Because It Does Not Allege the Misappropriation of a Commercial Advantage or Property Which Belonged Exclusively to Ginarte.	15
1.	Ginarte Fails to Please the Misappropriation of a Commercial Advantage or Property Belonging Exclusively to Ginarte.....	15
2.	Ginarte Cannot Claim Defendants Misappropriated Its Goodwill.....	17
F.	Ginarte's Unjust Enrichment Claim Fails Because Ginarte Does Not Plead a Relationship With Defendants Sufficient to Cause Reliance or Inducement.....	17
1.	Ginarte Does Not Allege a Relationship Between Ginarte and the Defendants.	18
2.	Ginarte Does Not Allege They Undertook Any Action for Defendants' Benefit.	18
G.	Ginarte's Civil RICO Claim Fails Because Ginarte Fails to Plead the Underlying Fraud Allegations with the Requisite Particularity.	19
1.	Ginarte Fails to Plead Any Factual Background of the Alleged Mail and Wire Fraud.	20
2.	Ginarte Fails to Particularize Its Claims to Each Defendant, or to Plead Scienter.....	21
3.	Ginarte Fails to Plead Detrimental Reliance.	22
H.	Ginarte's Conspiracy Claim Fails Because New York Does Not Recognize Conspiracy as a Cause of Action.....	23

I. Ginarte’s Request for a Permanent Injunction Fails Because Ginarte Has No Valid Claims and Because Ginarte Makes Only a Conclusory Allegation of Continuous Injury..... 24

1. Ginarte Has No Valid Claims Against Defendants and a Permanent Injunction Cannot Stand on Its Own..... 24

2. Ginarte Does Not Plead Continuous or Future Injury..... 25

3. Ginarte Makes Only a Conclusory Claim that It Has No Remedy at Law..... 26

IV. CONCLUSION..... 27

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Herzfeld & Rubin, P.C.</i> , 202 A.D.2d 351 (1st Dep’t 1994)	21
<i>Alexander & Alexander of New York, Inc. v. Fritzen</i> , 68 N.Y.2d 968 (N.Y. 1986)	24
<i>Allen v. Pollack</i> , 289 A.D.2d 426 (2d Dep’t 2001)	26
<i>Allenby, LLC v. Credit Suisse, AG</i> , 134 A.D.3d 577 (1st Dep’t 2015)	24
<i>Alliance Network, LLC v. Sidley Austin LLP</i> , 43 Misc. 3d 848 (Sup. Ct. N.Y. Cty. 2014)	24
<i>Allianz Underwriters Ins. Co. v Landmark Ins. Co.</i> , 13 AD3d 172 (1st Dep’t 2004)	6
<i>Alvord and Swift v. Stewart M. Muller Constr. Co., Inc.</i> , 46 N.Y.2d 276 (N.Y. 1978)	8
<i>Am. Preferred Prescription, Inc. v. Health Mgmt., Inc.</i> , 252 A.D.2d 414 (1st Dep’t 1998)	14
<i>Arsenault v. Forquer</i> , 197 A.D.2d 554 (2d Dep’t 1993)	12
<i>Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro</i> , 187 A.D.2d 384 (1st Dep’t 1992)	11
<i>BCRE 230 Riverside LLC v. Fuchs</i> , 59 A.D.3d 282 (1st Dep’t 2009)	13, 14
<i>Besicorp, Ltd. v. Kahn</i> , 290 A.D.2d 147 (3d Dep’t 2002)	21, 22
<i>Bongo Apparel, Inc. v. Iconix Brand Grp., Inc.</i> , No. 601903/2006, 2008 WL 41341 (Sup. Ct. N.Y. Cty. Jan. 2, 2008)	16, 17
<i>Burrowes v. Combs</i> , 25 A.D.3d 370 (1st Dep’t 2006)	8

<i>Caruso v. Bumgarner</i> , 120 A.D.3d 1174 (2d Dep’t 2014)	24
<i>Carvel Corp. v. Noonan</i> , 3 N.Y.3d 182 (N.Y. 2004)	7
<i>Chemical Bank v. Ettinger</i> , 196 A.D.2d 711 (1st Dep’t 1993)	8
<i>Costalas v. Amalfitano</i> , 305 A.D.2d 202 (1st Dep’t 2003)	11
<i>CSI Group, LLP v. Harper</i> , 153 A.D.3d 1314 (2d Dep’t 2017)	12
<i>Dillon v. City of New York</i> , 261 A.D.2d 34 (1st Dep’t 1999)	12, 14
<i>Donaldson v. Bottar</i> , 275 A.D.2d 897 (4th Dep’t 2000)	10
<i>Doscher v. Mannat, Phels & Phillips, LLP</i> , 148 A.D.3d 523 (1st Dep’t 2017)	11
<i>Facebook v. DLA Piper LLP</i> , 134 A.D.3d 610 (1st Dep’t 2015)	10
<i>Fowler v. Am. Lawyer Media, Inc.</i> , 306 A.D.2d 113 (1st Dep’t 2003)	6
<i>Frank v. Pepe</i> , 717 N.Y.S.2d 873 (Sup. Ct. Nassau Cty. 2000)	10
<i>Georgia Malone & Co. v. Rieder</i> , 19 N.Y.3d 511 (N.Y. 2012)	18
<i>Goldfine v. Sichenzia</i> , 118 F. Supp. 2d 392 (S.D.N.Y. 2000)	20, 22
<i>Guard-Life Corp. v. Parker Mfg. Corp.</i> , 50 N.Y.2d 183 (1980)	7, 9
<i>Hemi Grp., LLC v. City of New York</i> , 559 U.S. 1 (2010)	22
<i>Hoag v. Chancellor, Inc.</i> , 246 A.D.2d 224 (1st Dep’t 1998)	24

<i>Hoeffner v. Orrick, Herrington & Sutcliffe LLP</i> , 85 A.D.3d 457 (1st Dep’t 2011)	23
<i>Icy Splash Food & Beverage, Inc. v. Henckel</i> , 14 A.D.3d 595 (2d Dep’t 2005)	25
<i>ITC Ltd. v. Punchgini Inc.</i> , 9 N.Y.3d 467 (N.Y. 2007)	15
<i>Jaggie v. Northstar Tubular Corp.</i> , 195 A.D.2d 336 (1st Dep’t 1993)	21
<i>Jean v. Chinitz</i> , 163 A.D.3d 497 (1st Dep’t 2018)	10
<i>Jebran v. LaSalle Business Credit, LLC</i> , 33 A.D.3d 424 (1st Dep’t 2006)	24
<i>Jenny Yoo Collection, Inc. v. Watters Design Inc.</i> , No. 16 Civ. 2205, 2017 WL 4997838 (S.D.N.Y. Oct. 20, 2017)	18
<i>Kagan v. K-Tel Entertainment, Inc.</i> , 172 A.D.2d 375 (1st Dep’t 1991)	19
<i>Kallista, S.A. v. White & Williams LLP</i> , 51 Misc. 3d 401 (Sup. Ct. Westchester Cty. 2016)	11
<i>Koeppel v. Schroder</i> , 122 A.D.2d 780 (2d Dep’t 1986)	7, 25
<i>Lama Holding Co. v. Smith Barney Inc.</i> , 88 N.Y.2d 413 (N.Y. 1996)	6
<i>Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.</i> , 131 A.D.3d 583 (2d Dep’t 2015)	7
<i>Leder v. Spiegel</i> , 31 A.D.3d 266 (1st Dep’t 2006)	6
<i>Leon v. Martinez</i> , 84 N.Y.2d 83 (N.Y. 1994)	6
<i>Lichtenstein v. Polizzotto</i> , 152 Misc. 2d 241 (Sup. Ct. N.Y. Cty. 1991)	19
<i>Lowenbraun v. Garvey</i> , 60 A.D.3d 916 (2d Dep’t 2009)	7, 25

<i>M.J. & K. Co. v. Matthew Bender & Co.,</i> 220 A.D.2d 488 (2d Dep’t 1995)	8, 9
<i>Mahler v. Campagna,</i> 60 A.D.3d 1009 (2d Dep’t 2010)	11
<i>Majid & Assoc. P.C. v. Finkel,</i> No. 09266/2012, 2012 WL 9515679 (Sup. Ct. N.Y. Cty. Nov. 6, 2012)	7, 25
<i>Manas v. VMS Assoc., LLC,</i> 53 A.D.3d 451 (1st Dep’t 2008)	13, 14
<i>Mandarin Trading Ltd. v. Wildenstein,</i> 16 N.Y.3d 173 (N.Y. 2011)	18
<i>Mann v. Abel,</i> 10 N.Y.3d 271 (N.Y. 2008)	14
<i>Martinez v. JPMorgan Chase Bank, N.A.,</i> 178 F. Supp. 3d 184 (S.D.N.Y. 2016)	23
<i>Meghan Beard, Inc. v. Fadina,</i> 82 A.D.3d 591 (1st Dep’t 2011)	17
<i>Meimeteas v. Carter Ledyard & Millburn LLP,</i> 105 A.D.3d 643 (1st Dep’t 2013)	11
<i>Miller v. Walters,</i> 46 Misc. 3d 417 (Sup. Ct. N.Y. Cty. 2014)	6, 16, 19
<i>Mills v. Polar Molecular Corp.,</i> 12 F.3d 1170 (2d Cir. 1993)	22
<i>Morgan v. NYP Holdings, Inc.,</i> No. 500300/2017, 2017 WL 6567998 (Sup. Ct. Kings Cty. Dec. 15, 2017)	14, 15
<i>Murphy v. 317–319 Second Realty LLC,</i> 95 A.D.3d 443 (1st Dep’t 2012)	19
<i>NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.,</i> 87 N.Y. 614 (N.Y. 1996)	9
<i>NYC Management Grp., Inc. v. Brown-Miller,</i> No. 2617/2003, 2004 WL 1087784 (S.D.N.Y. May 14, 2004)	17
<i>Pasternack v. Laboratory Corp. of Am. Holdings,</i> 27 N.Y.3d 817 (N.Y. 2016)	22

<i>Peralta v. Figueroa</i> , No. 28094/2006, 2007 WL 4104122 (Sup. Ct. N.Y. Cty. Nov. 14, 2007)	21
<i>Pires v. The Bowery Presents, LLC</i> , 44 Misc.3d 704 (Sup. Ct. N.Y. Cty. 2014)	25, 26
<i>Pludeman v. Northern Leasing Systems, Inc.</i> , 40 A.D.3d 366 (1st Dep't 2007)	19, 21
<i>Project Cricket Acquisition, Inc. v. FCP Investors VI, L.P.</i> , 159 A.D.3d 600 (1st Dep't 2018)	23
<i>RKA Film Financing, LLC v. Kavanaugh</i> , 2018 WL 3973391 (Sup. Ct. N.Y. Cty. March 5, 2018)	9
<i>Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.</i> , 672 F.2d 1095 (2d Cir. 1982)	15
<i>Savitt v. Greenberg Traurig, LLP</i> , 126 A.D.3d 506 (1st Dep't 2015)	10
<i>Sedima, S.P.R.L. v. Imrex Co., Inc.</i> , 473 U.S. 479 (1985)	19
<i>Seldon v. Spinnell</i> , 95 A.D.3d 779 (1st Dep't 2012)	10
<i>Siller v. Third Brevoort Corp.</i> , 145 A.D.3d 595 (1st Dep't 2016)	10
<i>Simpson Elec. Corp. v. Leucadia, Inc.</i> , 72 N.Y.2d 450 (N.Y. 1988)	19
<i>Sky Medical Supply Inc. v. SCS Support Claims Serv., Inc.</i> , 17 F. Supp. 3d 207 (E.D.N.Y. 2014)	23
<i>Snyder v. Sony Music Entm't, Inc.</i> , 252 A.D.2d 294 (1st Dep't 1999)	9
<i>Tawil v. Wasser</i> , 21 A.D.3d 948 (2d Dep't 2005)	11
<i>Town of Liberty Volunteer Ambulance Corp. v. Catskill Regional Med. Ctr.</i> , 30 A.D.3d 739 (3d Dep't 2006)	27
<i>Tymoshenko v. Firtash</i> , 57 F. Supp. 3d 311 (S.D.N.Y. 2014)	20, 21

<i>U.S. v. Pierce</i> , 224 F.3d 158 (2d Cir. 2000).....	20
<i>Ullum v. American Kennel Club</i> , 134 A.D.3d 416 (1st Dep’t 2015)	12
<i>Waggoner v. Caruso</i> , 68 A.D.3d 1 (1st Dep’t 2009)	23
<i>Watkins v. Smith</i> , No. 12 Civ. 4635, 2012 WL 5868395 (S.D.N.Y. Nov. 19, 2012)	22
<i>Weinreb v. 37 Apartments Corp.</i> , 97 A.D.3d 54 (1st Dep’t 2012)	24
<i>Wolberg v. IAI N. Am., Inc.</i> , 161 A.D.3d 468 (1st Dep’t 2018)	12, 13, 14
Statutes	
Judiciary Law § 487	2, 10, 11
Rules	
CPLR 3013.....	8
CPLR 3016.....	8, 12
CPLR 3211.....	1, 6

Defendants William Schwitzer, William Schwitzer & Associates, P.C., Giovanni C. Merlino, Barry Aaron Semel-Weinstein, and Beth Michelle Diamond (collectively, the “Schwitzer firm,” “Schwitzer & Associates,” or the “Schwitzer Defendants”) respectfully submit this memorandum of law in support of their motion to dismiss the Complaint filed by Plaintiff Ginarte Gallagher’s Gonzelez & Winograd, LLP (“Ginarte” or the “Ginarte firm”), pursuant to CPLR 3211(a)(7), for failure to state a cause of action.¹

I. PRELIMINARY STATEMENT

This is a shameful, malicious prosecution brought by a plaintiff’s law firm—the Ginarte firm—against archrivals to whom it has recently lost clients, accusing them of “pay to play” ethics violations that are unspecified and wholly unsubstantiated in an unverified pleading, denied under oath by the alleged participants, and, in a word, a pack of lies. Even worse, the Ginarte firm then trumpeted the false allegations in its bad faith pleading to the media, intentionally generating adverse press that defamed the respected attorneys of the Schwitzer firm and smeared their professional reputations. In other words, this lawsuit is nothing more than a “publicity stunt” that shames our profession and warrants immediate dismissal.

Ginarte and Schwitzer & Associates are law firms that compete in the plaintiff’s personal injury arena. More recently, Ginarte’s client base has apparently declined, while Schwitzer & Associates, through the dedication and hard work of its attorneys—including named partner and founder William Schwitzer—has grown to become one of New York’s most respected and

¹ Defendants have also filed simultaneously with the motion a verified answer denying under oath the false and defamatory allegations in the Complaint. Co-Defendants Rene Garcia and the Garcia Law Firm have also filed a motion to dismiss. Co-Defendants Gomez and Pena have denied all the allegations against them in their own answers, and both Ms. Gomez and Ms. Pena have signed sworn affidavits expressly disclaiming all knowledge of these allegations, attached to the Schwitzer Defendants’ answer as Exhibits A and B (Ms. Gomez previously attached her affidavit to her answer, Dkt. 15).

successful firms in this field. Now, in a desperate attempt to stem the tide of its decline and prevent further client defections to its rivals, Ginarte has brought this baseless lawsuit defaming a competitor and abusing the judicial system in order to publicly smear its rival—and thereby gain a competitive advantage for its failing business.

Ginarte’s unverified complaint, purporting to assert a veritable laundry list of baseless claims, does not even attempt to comply with basic pleading standards and requirements. Rather than identifying particular people, places, times, or events to support its claims—which the Ginarte firm would have to know, if true, because it knows the former clients of the firm who left to “substitute in” Schwitzer & Associates—Ginarte instead provides only pseudonyms, generalities and conclusory statements. Moreover, under well-established case law, this common commercial scenario—an unhappy client taking his or her business from one competitor to another—only gives rise to liability in very limited circumstances not present here. Thus, even assuming this pleading’s defamatory allegations to be “true” for purposes of this motion, none of them can withstand scrutiny.

Tortious Interference with “At-Will” Contracts: To survive dismissal, Ginarte must allege, with particularity, that the Schwitzer Defendants’ alleged interference with Ginarte’s “at-will” retainer agreements amounted to a crime or independent tort. The Ginarte firm has utterly failed to do so. It has not identified the targets of the alleged interference, cited any specific contract allegedly interfered with, specified any individual defendant who allegedly engaged in the conduct described, or pleaded the conduct with sufficient particularity to meet the exceedingly high bar required to overcome the public policy interest in protecting a client’s absolute right to terminate the attorney-client relationship for any reason.

Judiciary Law § 487: There is an absolute bar against Ginarte’s claim under Judiciary Law §

487 requiring the identification in the plea of the specific violation. Ginarte's unverified pleading contains only a single conclusory allegation, claiming the Defendants have engaged in a “chronic and extreme” pattern of wrongdoing. With respect to the Schwitzer Defendants, the Complaint refers only to an inapposite disciplinary hearing for a former associate at a different, now-closed law firm for conduct that occurred in 2007 and that was not alleged to have involved any of the Schwitzer Defendants. Additionally, Ginarte was not a party to any relevant judicial proceeding at the time of the alleged misconduct, as required by the plain language of the statute.

Defamation: Ginarte’s defamation claim fails because the Complaint does not specify to whom the alleged defamatory statements were made, which of the Schwitzer Defendants allegedly made which statement, when the alleged statements were made, or what damages they caused, if any, other than the speculative loss of a contingency fee client. In addition, the alleged defamatory statements are paraphrased, rather than stated in full, and from what little detail is given in the Complaint, appear to be inactionable hyperbole or opinion. Any one of these defects would be dispositive; taken together, they compel this defamation claim's dismissal.

Unfair Competition: Ginarte does not allege the misappropriation of a commercial advantage or property which belonged exclusively to Ginarte, as required for an unfair competition claim. It does not allege Defendants misappropriated Ginarte’s work product, and as a matter of public policy, Ginarte cannot claim an ownership interest in any of its clients.

Unjust Enrichment: Ginarte has not pleaded a viable unjust enrichment claim because it has not alleged any relationship or dealings between Ginarte and Defendants, nor has it alleged Ginarte took any action at Defendants’ behest.

Civil RICO: Ginarte has not alleged a viable civil RICO claim, which must be pleaded with particularity—especially where, as here, it is predicated on alleged fraud. The Complaint

alleges Defendants committed mail and wire fraud but fails to describe a *single instance* of either. This defect alone is dispositive, but Ginarte's failure to describe any instances of alleged fraud also makes it impossible for the Court to evaluate whether Defendants were conspiring together to engage in a continuous pattern of wrongful behavior, as required to state a viable civil RICO claim. In addition, Defendants have failed to plead scienter with particularity and detrimental reliance at all. Moreover, they assert third-party fraud claims on behalf of former clients that are barred under New York law, and their alleged civil RICO damages are speculative.

Conspiracy: New York law does not recognize an independent cause of action in tort for conspiracy, and therefore, that claim must be dismissed, regardless of whether any of Ginarte's other claims somehow survive dismissal.

Permanent Injunction: Ginarte's claim for a permanent injunction cannot stand on its own without an underlying cause of action permitting such relief, and Ginarte has no viable causes of action. Moreover, Ginarte has made only conclusory allegations of lacking an adequate remedy at law (while, at the same time, alleging seven claims at law) and of fearing the likelihood of future misconduct (without alleging any basis for that outrageous claim), as required for the Court to issue a permanent injunction.

* * *

In short, there is a reason why this Complaint is unverified—because no one would dare verify these outrageous, defamatory allegations, for fear of criminal prosecution. In contrast, *all* of the Defendants have simultaneously answered here and sworn these allegations are patently false. This lawsuit, brought to great public fanfare by the Ginarte, is a stain on our profession because it never should have been brought in the first place. This Court should therefore

summarily dismiss this case and consider *sua sponte* sanctioning the Ginarte firm over its bad faith conduct.

II. STATEMENT OF FACTS

Schwitzer & Associates is a New York-based law firm specializing in personal injury representations. Complaint² (“Compl.”) ¶ 7. Defendants Merlino, Semel-Weinstein, and Diamond are attorneys at Schwitzer & Associates. Compl. ¶¶ 8–10. Ginarte is also a New York-based law firm specializing in personal injury law. Compl. ¶ 17. It is substantially larger than Schwitzer & Associates, with over thirty attorneys across seven offices in New York and New Jersey. Compl. ¶ 17–18. Its advertising budget is in the millions of dollars. Compl. ¶ 20.

According to its unverified complaint, Ginarte claims that, at various unspecified points beginning in September 2018, Ms. Pena and Ms. Gomez, along with unspecified “Defendants” and “other unnamed co-conspirators” met at “Dr. X’s” office and enticed unnamed clients of Ginarte to return with them to the Schwitzer & Associates office in free Uber cars. Compl. ¶ 35.

Once there, the Complaint alleges that unspecified conspirators allegedly made disparaging remarks about Ginarte (which the Complaint only paraphrases) and applied other “high-pressure sales tactics” until the unnamed clients supposedly capitulated and agreed to substitute Schwitzer & Associates as their counsel. Compl. ¶ 37. Once they did, Mr. Schwitzer would allegedly remove “two or three thousand dollars” and give it to the unnamed client from a “briefcase” he purportedly kept in his office for the purpose of enticing new clients. Compl. ¶ 38–39.

At no point does Ginarte particularize any of its accusations against specific Defendants or provide a factual basis, true or not, from which the Court can infer what was said and done, who said and did it, to whom, or when.

² Ginarte’s Complaint is attached as Exhibit A to the Mastro Affirmation in support of this motion to dismiss.

III. ARGUMENT

A. Dismissal Is Required Where No Factual Allegations Are Made That State a Claim.

CPLR 3211(a)(7) states that “a party may move for judgment dismissing one or more causes of action against him on the ground that [] the pleading fails to state a cause of action.” “On a motion to dismiss brought pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in [the] light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences.” *Miller v. Walters*, 46 Misc. 3d 417, 421 (Sup. Ct. N.Y. Cty. 2014) (citing *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dep’t 2004)). The court must then determine “whether the facts as alleged fit within any cognizable legal theory.” *Id.* (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. 1994)). “. “It is, however, also axiomatic that factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration.” *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dep’t 2006) (citations omitted); *see also Fowler v. Am. Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dep’t 2003) (holding vague and conclusory allegations are not sufficient to sustain a cause of action).

B. Ginarte’s Tortious Interference with Contract Claim Is Irreparably Flawed and Should Be Dismissed

Ginarte’s claim that Defendants tortiously interfered with the retainer agreements in place with Ginarte and its former unnamed clients cannot withstand scrutiny under long-standing New York law that provides clients nearly absolute freedom to change law firms. A claim for tortious interference with contract requires “a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v.*

Smith Barney Inc., 88 N.Y.2d 413, 424 (N.Y. 1996) (citations omitted). When the contract at issue is an attorney retainer agreement, public policy concerns require an even more rigorous standard:

It is established in New York that a client has an ***absolute right*** on public policy grounds to terminate the attorney-client relationship at any time without cause. Thus, an attorney's retainer agreement is a contract which is terminable at will and, as such, a competitor of one of the parties is free to use proper and legal means to induce termination. ***A competitor who lawfully induces termination of a contract terminable at will commits no ethical violation and does not produce a result contrary to the expectations of the parties.***

Koeppel v. Schroder, 122 A.D.2d 780, 782 (2d Dep't 1986) (citations and quotation marks omitted) (reversing a preliminary injunction where plaintiff sought to enjoin defendant attorneys from contacting any active client of plaintiffs' firm) (emphasis added). As such, claims against attorneys for "stealing" clients or "inducing" clients to switch firms are routinely dismissed under New York law. *See, e.g., Lowenbraun v. Garvey*, 60 A.D.3d 916, 917 (2d Dep't 2009) (affirming dismissal of tortious interference claim that attorney was stealing clients from a competitor firm); *Majid & Assoc. P.C. v. Finkel*, No. 09266/2012, 2012 WL 9515679, at *2–3 (Sup. Ct. N.Y. Cty. Nov. 6, 2012) (dismissing claim against attorney who was alleged to have "induced" client to execute a "consent to change attorney" form).

As such, to sustain a claim for tortious interference with a contract at will against Defendants, Ginarte must adequately allege that their conduct "amount[ed] to a ***crime*** or an ***independent tort.***" *Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 585–86 (2d Dep't 2015) (emphasis added) (citing *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (N.Y. 2004));³ *Majid & Assoc.*

³ Though the Carvel court was asked to clarify the standard for culpable conduct necessary to support a finding of tortious interference with prospective economic relations, it held that such conduct is the same as that which would support a finding of tortious interference with a non-binding contract. *Carvel Corp.*, 3 N.Y.3d at 191. New York courts treat claims for tortious interference with a contract at will in the same manner as they treat claims for tortious interference with business relations—and require the more rigorous pleading standard than interference with a binding contract. *See Guard-Life Corp. v. Parker Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980) ("[w]e are persuaded that interference with performance of voidable contracts should be treated the same as interference with contracts terminable at will for purposes of imposing liability in tort, and that both fall in the same category.").

P.C., 2012 WL 9515679, at *2 (“to state a cause of action based on tortious interference with a contract terminable at will, there must be allegations of wrongful conduct, which includes fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties”).

As a threshold matter, Ginarte’s bald allegations that unspecified Schwitzer & Associates employees engaged in a fraudulent “scheme” of stealing clients by “verbally denigrating” Ginarte and paying money stashed in a suitcase to an unknown number of unnamed clients (Compl. ¶ 46–47), are grossly inadequate under CPLR 3016, which requires that in any action based upon misrepresentation and fraud, “the circumstances constituting the wrong shall ***be stated in detail.***” (emphasis added); *see also* CPLR 3013 (furthering requiring that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of occurrences, intended to be proved and the material elements of each cause of action or defense.”)

Where a complaint for tortious interference with contract does not specify the ***exact facts*** giving rise to the tortious interference or breach of contract, the cause of action should be dismissed. *See, e.g., Alvord and Swift v. Stewart M. Muller Constr. Co., Inc.*, 46 N.Y.2d 276, 281 (N.Y. 1978) (dismissing intentional interference with contractual relations claim because “plaintiff was obliged to produce evidence, not just unsubstantiated allegations or assertions”); *M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 490 (2d Dep’t 1995) (dismissing tortious interference with contractual relations claim because plaintiffs offered merely conclusory allegations without any factual basis in support); *Chemical Bank v. Ettinger*, 196 A.D.2d 711, 716 (1st Dep’t 1993) (dismissing counterclaim for tortious interference where “no specific reference was made to any particular contract with which plaintiff interfered”); *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep’t 2006) (holding tortious interference claims must be supported by more than mere speculation).

For example, in the case of *M.J. & K. Co.*, 220 A.D.2d at 489–90, the court dismissed a tortious interference claim on the ground that the factual allegations in the complaint were insufficient: “The plaintiffs’ mere contentions that third parties cancelled contracts with them because of the alleged defamatory remarks made by [defendant] Bender’s representatives, offered with no factual basis to support the allegations, was insufficient to state a cause of action for tortious interference with contractual relations.” *See also RKA Film Financing, LLC v. Kavanaugh*, 2018 WL 3973391, at *4 (Sup. Ct. N.Y. Cty. March 5, 2018) (“The global failure to name a party to whom alleged misrepresentations were made is fatal to the complaint.”).

Here, the Complaint contains no details whatsoever about the supposed tortious actions by the Defendants—no specific client is named, no specific dates are given, no specific times are provided, and no places beyond a mysterious “Dr. X’s office” and Schwitzer’s conference room are mentioned. The only time period provided is “[i]n or around September 2018.” (Comp. ¶ 32). Moreover, the Complaint never indicates what each specific Defendant is alleged to have done or said to these unnamed “targeted clients,” but instead lumps all “Defendants” together in textbook improper group pleading. *See, e.g.*, Compl. ¶¶ 35, 38. Indeed, the only specific allegations relating to Mr. Merlino, Mr. Semel-Weinstein, and Ms. Diamond **at all** in the Complaint are that—at some unknown time—they were in a conference room and supposedly employed “high-pressure sales tactics”⁴ that allegedly included some unspecified “denigration of Ginarte.” Compl. ¶ 37. The only allegations relating to Mr. Schwitzer are that “on information and belief,” he “kept a briefcase full of cash” that he used to pay to

⁴ “High-pressure sales tactics” cannot satisfy the rigorous standard required to state a tortious interference of an at-will contract claim. The Court of Appeals has made clear that “persuasion alone” even where “it is knowingly directed at interference with the contract” does not constitute “wrongful means.” *Guard-Life Corp.*, 50 N.Y.2d at 191; *see also NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 87 N.Y. 614, 625 (N. Y. 1996); *accord Snyder v. Sony Music Entm’t, Inc.*, 252 A.D.2d 294, 300 (1st Dep’t 1999) (“‘Wrongful means’ includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required.”).

some unnamed “Ginarte clients” and that he paid unspecified “case-runners.” Compl. ¶¶ 39–40.

Ginarte’s vague and conclusory allegations are insufficient as a matter of law, and its tortious interference claim must be dismissed.

C. Ginarte’s Claim Under Judiciary Law § 487 Must Be Dismissed Because the Claim Is Not Pleaded with Particularity and Because Ginarte Was Not a Party to Any Relevant Judicial Proceeding at the Time of the Alleged Misconduct.

Judiciary Law § 487 states, in relevant part, that “an attorney who [] [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.” N.Y. JUD. LAW § 487 (McKinney 2018). “Relief under a cause of action based upon Judiciary Law § 487 is not lightly given and requires a showing of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys that caused damages.” *Facebook v. DLA Piper LLP*, 134 A.D.3d 610, 615 (1st Dep’t 2015) (citations and quotation marks omitted). The “essential elements of a cause of action under the statute” are “intentional deceit and damages proximately caused by the deceit.” *Jean v. Chinitz*, 163 A.D.3d 497, 497 (1st Dep’t 2018). The cause of action must also be pleaded with “the requisite particularity.” *Id.*; *see also Facebook*, 134 A.D.3d at 615. In addition, the claim can only be brought against defendants acting in their capacity as an attorney. *Siller v. Third Brevoort Corp.*, 145 A.D.3d 595, 596 (1st Dep’t 2016); *Seldon v. Spinnell*, 95 A.D.3d 779, 779 (1st Dep’t 2012). In addition, the courts require a showing of “chronic, extreme patter of legal delinquency” in order to state a viable Judiciary Law § 487 claim. *See Frank v. Pepe*, 717 N.Y.S.2d 873, 878 (Sup. Ct. Nassau Cty. 2000) (quoting *Donaldson v. Bottar*, 275 A.D.2d 897, 898 (4th Dep’t 2000)).

Ginarte’s Complaint contains only “bare legal conclusions that the defendant attorneys . . . acted with the requisite intent to deceive.” *Savitt v. Greenberg Traurig, LLP*, 126 A.D.3d 506, 507 (1st Dep’t 2015). The only reference to an intent to deceive is a conclusory allegation that Defendants

“engaged in a pattern of wrongdoing and deceit that is both chronic and extreme in nature” (Compl. ¶ 52), and the Complaint attaches an irrelevant disciplinary case that occurred *in 2007* regarding conduct by a non-party and former associate of Dinkes & Schwitzer, a law firm that has long been closed. *See* Compl., Ex. 1. These allegations, lacking any factual basis or specificity, and in no way related to the Schwitzer Defendants, are plainly insufficient to sustain a § 487 claim. *See Doscher v. Mannat, Phels & Phillips, LLP*, 148 A.D.3d 523, 524 (1st Dep’t 2017) (“the allegations regarding scienter lack the requisite particularity”).⁵

In addition, “to make out a claim under the statute the deceit complained of must have occurred during a judicial proceeding *to which the plaintiff was a party.*” *Kallista, S.A. v. White & Williams LLP*, 51 Misc. 3d 401, 418 (Sup. Ct. Westchester Cty. 2016) (emphasis added) (citing *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 386 (1st Dep’t 1992) (dismissing Judiciary Law § 487 claim where “the alleged deceit did not occur during a pending judicial proceeding in which plaintiff was a party”)). There is no allegation—nor could there be—that Ginarte was a party to any litigation, and as such, it lacks standing to assert this claim as a threshold matter.

D. Ginarte Fails to State a Claim for Defamation Because the Claim Is Not Pleaded with Particularity and the Alleged Statements Are Figurative and Hyperbolic.

⁵ Moreover, this claim fails because “the statute applies only to wrongful conduct by an attorney in an action that is actually pending.” *Mahler v. Campagna*, 60 A.D.3d 1009, 1012–13 (2d Dep’t 2010); *accord Costalas v. Amalfitano*, 305 A.D.2d 202, 204 (1st Dep’t 2003) (“the alleged deceit forming the basis of the cause of action, if not directed at a court, must occur during the course of a ‘pending judicial proceeding’”); *Tawil v. Wasser*, 21 A.D.3d 948 (2d Dep’t 2005) (“this ‘statute only applies to wrongful conduct by an attorney in a suit actually pending’”); *Meimeteas v. Carter Ledyard & Millburn LLP*, 105 A.D.3d 643, 643 (1st Dep’t 2013) (“His claim under Judiciary Law § 487 is barred because that statute only applies (except where there is deceit directed against a court) where the alleged deceit takes place during the course of a pending judicial proceeding, and there was no pending proceeding here.”). The Complaint, although it generally refers to some unknown clients filing substitutions of counsel in unknown and unspecified lawsuits, does not contain any allegations relating to any conduct by the Schwitzer Defendants in a pending action and must be dismissed on this independent ground.

The elements of a defamation claim are, “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.” *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep’t 1999). “The complaint also must allege the time, place and manner of the false statement and specify to whom it was made.” *Id.* Under CPLR 3016(a), the complaint must also set forth “the particular words complained of.” The language at issue cannot amount to “expressions of opinion” or “‘loose, figurative or hyperbolic statements.’” *Wolberg v. IAIN Am., Inc.*, 161 A.D.3d 468, 470 (1st Dep’t 2018) (quoting *Dillon*, 261 A.D.2d at 38).

1. Ginarte Does Not Plead Who Made the Alleged Statements, to Whom They Were Made, or When They Were Made.

Ginarte’s defamation claim fails for multiple reasons. First, the Complaint does not specify when or to whom the alleged statements were made—a dispositive omission—and refers only to unnamed “targeted clients.” See *Dillon*, 261 A.D.2d at 38; *Arsenault v. Forquer*, 197 A.D.2d 554, 556 (2d Dep’t 1993) (“[T]he plaintiff has failed to allege the specific persons to whom the letter was published and the manner of its publication, as required.”); *Ullum v. American Kennel Club*, 134 A.D.3d 416, 417 (1st Dep’t 2015) (same); *Wolberg*, 161 A.D.3d at 470 (“The allegation that any of four named individuals made statements to another named individual and to ‘all IAINA employees’ ‘in or about Spring 2016’ or ‘in April or May 2016’ is insufficiently specific.”). As one court recently explained, “[f]ailure to state the particular person or persons to whom the allegedly defamatory statements were made [] warrants dismissal.” *CSI Group, LLP v. Harper*, 153 A.D.3d 1314, 1321 (2d Dep’t 2017) (dismissing action because plaintiffs failed to specify the persons to whom the defamatory statements were made or actual words complained of). Given this well-established requirement under New York law, Ginarte’s failure to include even this basic detail is fatal to its claim.

The Complaint also fails to state which of the Defendants made which statement, instead alleging broadly that “Defendants and their unnamed co-conspirators made false statements about Ginarte.” Compl. ¶ 55. This, too, is a dispositive defect in the Complaint. *See BCRE 230 Riverside LLC v. Fuchs*, 59 A.D.3d 282, 283 (1st Dep’t 2009) (dismissing a defamation claim where it “failed to state with particularity what the allegedly false statements were and who made them”); *Wolberg*, 161 A.D.3d at 470 (dismissing a defamation claim where the complaint alleged “any of four named individuals made statements”).

Next, Ginarte only vaguely describes the timeframe in which these statements were allegedly made, claiming the unspecified Defendants began making them “starting in or around September 2018.” This deficiency is yet another way in which the Complaint fails under binding precedent. As recently as 2018, the First Department dismissed a defamation claim that gave a similarly vague timeframe. *Wolberg*, 161 A.D.3d at 470 (finding an allegation of defamatory statements made “‘in or about Spring 2016’ or ‘in April or May 2016’” “insufficiently specific”).

Simply put, Ginarte has failed to plead who made which statement, at what time, or to whom. Where a complaint is so utterly lacking in any form of particularity regarding the circumstances of the alleged statements, a defamation claim cannot survive a pleadings challenge.

2. Ginarte Pleads Only Paraphrased Versions of the Alleged Statements.

The paraphrased manner in which the alleged statements are pleaded also warrants dismissal. The Court can only consider “the particular defamatory words” and may not entertain a claim “based instead on a paraphrased version.” *BCRE 230 Riverside LLC*, 59 A.D.3d at 283 (quotation marks omitted); *see also, Manas v. VMS Assoc., LLC*, 53 A.D.3d 451, 454-55 (1st Dep’t 2008) (dismissing a defamation claim where “plaintiff did not plead in the complaint the specific words allegedly used” and “appears to have paraphrased the allegedly defamatory statements”). Ginarte does not plead a single complete statement supposedly uttered by the unspecified Defendants. The closest it comes is offering

“a paraphrased version” with a few words selectively quoted. It claims an unspecified Defendant told an unnamed client “Ginarte is a *‘thief’* or *‘the biggest thief’*,” and that, “Ginarte, as a law firm, is analogous to *‘doctors that kill you.’*” Compl. ¶ 55 (emphasis added). Ginarte’s pleading of only a paraphrased account falls short. *See Am. Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 252 A.D.2d 414, 420 (1st Dep’t 1998) (“As drafted, the complaint thus reveals that plaintiff was merely paraphrasing the statements, notwithstanding the quotations marks around the word ‘murderers’, and the claim, insofar as based on the above-mentioned comments, should therefore be dismissed.”); *BCRE 230 Riverside LLC*, 59 A.D.3d at 283; *Manas*, 53 A.D.3d at 454.

3. The Alleged Statements Constitute Opinion or Loose, Figurative, or Hyperbolic Statements—None of Which Are Actionable.

Lastly, language constituting an opinion or “‘loose, figurative or hyperbolic statements’” cannot support a claim for defamation. *See Wolberg*, 161 A.D.3d at 470 (1st Dep’t 2018) (quoting *Dillon*, 261 A.D.2d at 38). In deciding whether a statement is defamatory, a court must “‘must consider the content of the communication as a whole, as well as its tone and apparent purpose and in particular should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the [] plaintiff.’” *Mann v. Abel*, 10 N.Y.3d 271, 276 (N.Y. 2008) (quotation marks omitted).

Here, Ginarte has chosen to only paraphrase the alleged statements and selectively quote seven purported words. Those seven words, however, at best support an inference of the kind of “‘loose, figurative or hyperbolic statements’” that cannot give rise to a defamation claim. *Wolberg*, 161 A.D.3d at 470 (1st Dep’t 2018) (quoting *Dillon*, 261 A.D.2d at 38). That Ginarte is like “doctors that kill you” is clearly figurative and hyperbolic. The meaning of the phrase itself is not clear without any context pleaded, but a reasonable listener would not infer from that statement that the speaker believes Ginarte kills its clients. *See Morgan v. NYP Holdings, Inc.*, No. 500300/2017, 2017 WL 6567998, at *6 (Sup.

Ct. Kings Cty. Dec. 15, 2017) (finding that statements that plaintiff is “like a Nazi” and is “the Grinch of the Jewish holidays” “do not have a precise meaning, and are hyperbolic and incapable of being proven true or false”). Similarly, without any context, it is impossible to discern what the unspecified speaker might have meant in calling Ginarte “the biggest thief,” but it is unlikely a reasonable listener would have inferred that Ginarte actually steals from its clients, versus simply not litigating their cases effectively, or some other unspecified meaning. *See id.*

In sum, Ginarte’s defamation claim must be dismissed because it, first, does not specify who made the alleged statements, second, does not specify to whom the statements were made, third, does not specify when the statements were made, fourth, does not specify the particular words that were said but instead paraphrases the alleged statements, and fifth, the words Ginarte does selectively quote are hyperbolic and figurative. As explained above, any single one of these five flaws is sufficient to warrant dismissal.

E. Ginarte’s Unfair Competition Claim Fails Because It Does Not Allege the Misappropriation of a Commercial Advantage or Property Which Belonged Exclusively to Ginarte.

New York recognizes two theories of common-law unfair competition: “palming off and misappropriation.” *ITC Ltd. v. Punchgini Inc.*, 9 N.Y.3d 467, 476 (N.Y. 2007). “Palming off” is not relevant here because there is no allegation that Defendants attempted to sell their services as Ginarte’s. *Id.* “Misappropriation usually concerns the taking and use of the plaintiff’s property to compete against the plaintiff’s own use of the same property.” *Id.* at 478 (quoting *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982)).

1. Ginarte Fails to Please the Misappropriation of a Commercial Advantage or Property Belonging Exclusively to Ginarte.

Ginarte fails to state a claim under a misappropriation theory of unfair competition because it does not allege the misappropriation “of a commercial advantage or property which belonged

exclusively to” Ginarte. *Bongo Apparel, Inc. v. Iconix Brand Grp., Inc.*, No. 601903/2006, 2008 WL 41341, at *13 (Sup. Ct. N.Y. Cty. Jan. 2, 2008). While Ginarte claims that Defendants “misappropriated Ginarte’s labors, skills, expenditures and good will,” this claim fails because Defendant did not actually utilize any of the fruits of Ginarte’s efforts in its alleged recruitment of the unnamed clients. There is no allegation, for example, that Defendants appropriated Ginarte’s work product and discussed it with the clients. *See Miller v. Walters*, 46 Misc. 3d 417, 427 (Sup. Ct. N.Y. Cty. 2014) (dismissing an unfair competition claim where “Plaintiffs here do not allege that they compiled information and that such information was taken by Defendants for their own use”). Instead, the only conceivable property interest Defendants might have appropriated is an interest in the retention of Ginarte’s clients, but, as people are not “property,” New York courts have rejected this pleading tactic as “far afield from a proper misappropriation claim.” *Miller*, 46 Misc. 3d at 427.

In *Miller*, this court considered an unfair competition claim based on a sports agent’s loss to a rival agency of one of its clients, NBA player Larry Sanders. *Id.* at 420. The plaintiff alleged that the defendants convinced Sanders to fire the plaintiff and retain the defendants as his agent through a host of unseemly schemes, including promising Sanders’ girlfriend a portion of the defendants’ commission if she could convince Sanders to switch. *Id.*

This court found that, regardless of the means used to recruit Sanders away from the plaintiff, an unfair competition claim could not stand because the “claim distills down to a claim for ownership, at least in part, of Sanders’ accomplishments in his second and third seasons in the NBA.” *Id.* at 427.

It noted that:

Plaintiffs allege that they expended time and effort for one-and-a-half years in order to secure a lucrative second contract for Sanders and that, at the last minute, Defendants committed wrongful acts by which they misappropriated the fruits of Plaintiffs’ efforts . . . Plaintiffs contend that their efforts are reflected in Sanders’ achievements and that Defendants ‘took’ Sanders so to benefit financially from those achievements. ***Such a***

claim is far afield from a proper misappropriation claim, since Plaintiffs of course do not contend Sanders was their ‘property’...

Id. at 426–27 (emphasis added). Like the plaintiff in *Miller*, Ginarte cannot claim an ownership interest in its clients, which “is particularly so where, as here, plaintiff[’s] only interest lies in a voidable contract in which plaintiffs have no legal right to future performance but only an expectancy.” *NYC Management Grp., Inc. v. Brown-Miller*, No. 2617/2003, 2004 WL 1087784, at *9 (S.D.N.Y. May 14, 2004).

2. Ginarte Cannot Claim Defendants Misappropriated Its Goodwill.

Nor can Ginarte claim Defendants misappropriated its goodwill, as “under New York’s unfair competition law, a defendant misappropriates a plaintiff’s goodwill when it sells its product through misleading the public into thinking that the product is sponsored by or derived from plaintiff or plaintiff’s product.” *Bongo Apparel, Inc.*, 2008 WL 41341, at *13. To stand, there must be allegations that the Schwitzer Defendants sought to capitalize on the Ginarte name and/or reputation. *See id.* Nothing in the Complaint makes such a claim—on the contrary, Ginarte claims Defendants made unflattering “false statements” about Ginarte (Compl. ¶ 65), the very antithesis of “capitalizing.”

The few New York courts that have considered this pleading defect have come to the same conclusion: a plaintiff cannot claim an ownership interest in the retention of its clients to support a claim for unfair competition. *See, Meghan Beard, Inc. v. Fadina*, 82 A.D.3d 591, 592–93 (1st Dep’t 2011); *Bongo Apparel, Inc.*, 2008 WL 41341, at *13; *Miller*, 46 Misc. 3d at 427; *NYC Mgmt. Grp., Inc.*, 2004 WL 1087784, at *9. Where, as here, there is no allegation that Defendants actually appropriated and used any of the fruits of Ginarte’s efforts or goodwill in recruiting the unnamed clients, there is no viable basis for an unfair competition claim.

F. Ginarte’s Unjust Enrichment Claim Fails Because Ginarte Does Not Plead a Relationship With Defendants Sufficient to Cause Reliance or Inducement.

“[I]n order to adequately plead [an unjust enrichment] claim, the plaintiff must allege ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.’” *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (N.Y. 2012) (quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (N.Y. 2011)). The plaintiff must also “assert a connection between the parties that [is] not too attenuated.” *Id.* at 517. That connection must be such that it “could have caused reliance or inducement.” *Mandarin Trading Ltd.*, 16 N.Y.3d at 182.

1. Ginarte Does Not Allege a Relationship Between Ginarte and the Defendants.

Ginarte’s unjust enrichment claim fails because “the relationship between” Ginarte and Defendants “is too attenuated because they simply had no dealings with each other.” *Georgia Malone & Co.*, 19 N.Y.3d at 517–18. There is no allegation in the Complaint that Ginarte and the Defendants “had any contact.” *Id.* at 518. As with Ginarte’s unfair competition claim, *Miller*, which proceeds under similar facts, is dispositive:

[P]laintiffs allege no relationship with Defendants, let alone a relationship sufficient to cause reliance or inducement. Plaintiffs assert that Defendants are rival [] firms. While plaintiffs contend that it is enough that Defendants were aware of Plaintiffs’ relationship with [the clients], the First Department has affirmed that ‘awareness,’ without more, does not establish the relationship necessary to state an unjust enrichment claim.

Miller, 46 Misc. 3d at 425 (quoting *Georgia Malone & Co.*, 19 N.Y.3d at 517). The court then explicitly rejected the notion that being “business competitors” is a sufficiently close relationship to support an unjust enrichment claim. *Id.*; see also *Jenny Yoo Collection, Inc. v. Watters Design Inc.*, No. 16 Civ. 2205, 2017 WL 4997838, at *11 (S.D.N.Y. Oct. 20, 2017) (dismissing an unjust enrichment claim between “direct competitor” dressmakers related to an allegedly stolen design because plaintiff alleged “no prior course of business dealings . . . whatsoever” with defendant).

2. Ginarte Does Not Allege They Undertook Any Action for Defendants’ Benefit.

In *Miller*, the court noted a related failure in plaintiff's pleadings, applicable here as well.

Ginarte has:

not alleged that they undertook any actions for defendants' benefit. 'While [a] cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs, *it must also be pleaded and proven that the benefit conferring services were performed for the defendant*, thereby resulting in defendant's unjust enrichment.'

Id. at 426 (emphasis in original) (quoting *Murphy v. 317-319 Second Realty LLC*, 95 A.D.3d 443, 446 (1st Dep't 2012)); *see also Kagan v. K-Tel Entertainment, Inc.*, 172 A.D.2d 375, 376 (1st Dep't 1991) ("[T]o recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.") (internal citations omitted).

Ginarte has not pleaded that it undertook any actions on Defendants' behalf. Its allegation that Defendants "improperly solicited," Compl. ¶ 70, Ginarte's clients, thereby thwarting the efforts Ginarte undertook to retain those clients, is fundamentally at odds with the notion that Ginarte might have performed services at the Defendant's "behest." As such, the unjust enrichment claim fails as a matter of law. *See Kagan*, 172 A.D.2d at 376.

G. Ginarte's Civil RICO Claim Fails Because Ginarte Fails to Plead the Underlying Fraud Allegations with the Requisite Particularity.

"[A] violation of section 1962(c) requires '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 462 (N.Y. 1988) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)). The underlying acts making up the pattern of racketeering activity must also be pleaded with sufficient particularity. *Pludeman v. Northern Leasing Systems, Inc.*, 40 A.D.3d 366, 368 (1st Dep't 2007); *Lichtenstein v. Polizzotto*, 152

Misc. 2d 241, 246 (Sup. Ct. N.Y. Cty. 1991). Here, Ginarte alleges that unspecified Defendants have committed mail fraud and wire fraud. Compl. ¶ 77. “The elements of wire fraud [] are (i) a scheme to defraud (ii) to get money or property, (iii) furthered by the use of interstate wires.’ The elements of mail fraud [] are identical, except that mail fraud must be furthered by use of the mails.” *Tymoshenko v. Firtash*, 57 F. Supp. 3d 311, 321 (S.D.N.Y. 2014) (quoting *U.S. v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000)).

1. Ginarte Fails to Plead Any Factual Background of the Alleged Mail and Wire Fraud and Therefore Cannot Meet the Continuity and Pattern Requirement.

Ginarte’s Civil RICO claim fails because, as discussed *infra*, Ginarte does not make “any legally sufficient allegation of fraud.” *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 405 (S.D.N.Y. 2000) (“Without making any legally sufficient allegation of fraud, Plaintiffs cannot allege mail fraud.”). “The failure of plaintiff to set forth in the complaint as to approximately when the predicate acts were committed; the parties involved in the mail or wire communications; and the substance of the materials and communications transmitted in furtherance of the scheme to defraud, renders the complaint defective.” *Lichtenstein*, 152 Misc. 2d at 246.

Ginarte pleads no factual background behind its conclusory allegation that “Defendants and their unnamed co-conspirators used the telephone, internet, facsimile machine, and the U.S. mail as vehicles to assist them in perpetrating a fraud on Ginarte.” Compl. ¶ 81. The Complaint is bereft of any details regarding even a single specific phone call, fax, internet communication, or mailing made in furtherance of the alleged fraud. This omission dooms the civil RICO claim.

First, “[t]he requirement of RICO ‘pattern’ as set forth by the Supreme Court requires continuity plus relationship.” *Lichtenstein*, 152 Misc. 2d at 245. Defendants cannot meet the pattern requirement because they have “failed to identify any specific act of mail or wire fraud committed by defendants,” and therefore, “[t]he court cannot determine whether the predicate offenses allegedly

committed by defendants are related, or are isolated and sporadic acts.” *Id.* at 245–6. Next, in order to properly plead mail and wire fraud, Ginarte must show that “the mailing was for the purpose of executing the [fraudulent] scheme or incidental to an essential part of the scheme.” *Besicorp, Ltd. v. Kahn*, 290 A.D.2d 147, 152 (3d Dep’t 2002) (citations and quotation marks omitted). Because Ginarte has failed to plead “the manner in which any mailing or wiring was fraudulent and how the purpose of each such mailing fit within defendants’ fraudulent scheme,” “the lack of particularity in asserting the claim [is] fatal.” *Id.*; *see also Pludeman*, 40 A.D.3d at 368 (dismissing a civil RICO claim predicated on mail and wire fraud where plaintiffs failed to plead “information concerning the statements” in the allegedly fraudulent letters nor “any details about the conversations” forming the basis of the wire fraud allegation).

2. Ginarte Fails to Particularize Its Claims to Each Defendant, or to Plead Scienter.

Ginarte also “fails to particularize the elements under this section as to each defendant.” *Peralta v. Figueroa*, No. 28094/2006, 2007 WL 4104122, at *11 (Sup. Ct. N.Y. Cty. Nov. 14, 2007). Without doing so, Ginarte cannot “properly plead the ‘conduct’ element of this section,” which would require “pleading each defendant’s participation in the operation and management of the enterprise.” *Id.* (citation and quotation marks omitted); *see also Abbott v. Herzfeld & Rubin, P.C.*, 202 A.D.2d 351, 351 (1st Dep’t 1994) (dismissing a civil RICO claim where “the complaint does not attribute specific misrepresentations or omissions . . . to the attorney defendants”).

In addition, the Complaint does not contain the required “allegation of scienter nor are there facts alleged from which the court could infer the requisite fraudulent intent.” *Jaggie v. Northstar Tubular Corp.*, 195 A.D.2d 336, 337 (1st Dep’t 1993) (holding that “[u]nder these circumstances, a claim for mail fraud was not made out”); *Abbott*, 202 A.D.2d at 351 (dismissing a civil RICO claim where it “does not set forth a factual basis that would give rise to an inference of fraudulent intent”); *Tymoshenko*, 57 F. Supp. 3d at 321 (“a ‘complaint alleging mail and wire fraud must plead facts that

give rise to a strong inference that the defendant possessed fraudulent intent”) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993)). Given the dearth of factual allegations—in particular, alleged acts constituting mail or wire fraud or who might have committed them—the Court cannot infer from the Complaint that the Defendants intended to commit fraud.

3. Ginarte Fails to Plead Detrimental Reliance Because Third Party Fraud Is Not a Cause of Action in New York.

Last, as discussed *infra*, “the complaint fail[s] to allege how there was reliance on the allegedly fraudulent representation or that such reliance caused plaintiff’s injury.” *Besicorp Ltd.*, 290 A.D.2d at 152. In order to establish civil standing for a RICO violation, “the plaintiff is ‘required to show that a RICO predicate offense not only was a ‘but for’ cause of his injury but was the proximate cause as well.’” *Watkins v. Smith*, No. 12 Civ. 4635, 2012 WL 5868395, at *6 (S.D.N.Y. Nov. 19, 2012), *aff’d* 561 Fed. Appx. 46 (2d Cir. 2014) (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)).

Further, even if Ginarte had pleaded reliance on behalf of the unnamed clients, the New York Court of Appeals recently “decline[d] to extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff.” *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817, 829 (N.Y. 2016). Rather, “a fraud claim requires *the plaintiff* to have relied upon a misrepresentation by a defendant to his or her detriment.” *Id.* (emphasis added). Because Ginarte does not allege it relied on any fraudulent activity by Defendants, it cannot make “any legally sufficient allegation of fraud” and its civil RICO claim therefore fails. *See Goldfine*, 118 F. Supp. 2d at 405 (S.D.N.Y. 2000) (finding RICO claim “deficient as a matter of law” where plaintiffs could not state a common law fraud claim).

Moreover, Ginarte does not allege that any of the unnamed clients relied on any of the unspecified Defendants’ alleged misrepresentations in deciding to substitute Schwitzer & Associates as counsel—and there could be an untold number of reasons (including dissatisfaction with Ginarte’s

representation) for the substitution. Therefore, Ginarte can only impermissibly speculate that it suffered any damages as a result of the alleged “RICO” operation. *Martinez v. JPMorgan Chase Bank, N.A.*, 178 F. Supp. 3d 184, 190 (S.D.N.Y. 2016) (dismissing a civil RICO claim where plaintiff presented “only conclusory assertions” that a financial injury would not have occurred but-for defendant’s alleged fraud). Ginarte’s claim for damages is thus similarly uncertain and speculative in that it necessarily relies on some future event to occur, namely, “the results of pending litigation.” *Sky Medical Supply Inc. v. SCS Support Claims Serv., Inc.*, 17 F. Supp. 3d 207, 232 (E.D.N.Y. 2014). If the unnamed clients’ claims do not ultimately prevail, Ginarte would have suffered no, or limited damages by losing those representations.

Ginarte’s failure to plead its civil RICO claim with any particularity makes it impossible for the Court to infer a pattern of actions, that those actions furthered a fraudulent scheme, who specifically might have committed a fraudulent act, that any of the unspecified Defendants actually intended to commit fraud, or that the unnamed clients relied on any misrepresentations such that the alleged fraud was the proximate cause of an injury to Ginarte. Further, the claim is deficient out the gate because New York does not recognize third party fraud. As such, its civil RICO claim is insufficient as a matter of law.

H. Ginarte’s Conspiracy Claim Fails Because New York Does Not Recognize Conspiracy as a Cause of Action.

“[T]he claim of conspiracy to commit fraud is not viable because the State of New York does not recognize an independent cause of action in tort for conspiracy.” *Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep’t 2009); *accord Project Cricket Acquisition, Inc. v. FCP Investors VI, L.P.*, 159 A.D.3d 600, 601 (1st Dep’t 2018) (“Civil conspiracy is not recognized as a cause of action in New York.”); *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep’t 2011) (“[I]t is well settled that New York does not recognize an independent civil tort of conspiracy.”). Even where the

court allows the plaintiff's underlying claims to survive, it will still dismiss conspiracy as a cause of action.⁶ *See, e.g., Allenby, LLC v. Credit Suisse, AG*, 134 A.D.3d 577, 581 (1st Dep't 2015) (dismissing conspiracy claim while reinstating underlying fraud claim); *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 230 (1st Dep't 1998) (dismissing conspiracy claim while reinstating underlying tortious interference claim). As such, Ginarte's conspiracy claim must be dismissed.

I. Ginarte's Request for a Permanent Injunction Fails Because Ginarte Has No Valid Claims and Because Ginarte Makes Only a Conclusory Allegation of Continuous Injury.

"To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." *Caruso v. Bumgarner*, 120 A.D.3d 1174, 1175 (2d Dep't 2014) (citations and quotation marks omitted). "Moreover, injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action against those defendants." *Weinreb v. 37 Apartments Corp.*, 97 A.D.3d 54, 58–59 (1st Dep't 2012).

1. Ginarte Has No Valid Claims Against Defendants and a Permanent Injunction Cannot Stand on Its Own.

Because Ginarte has failed to state a claim against Defendants, its cause of action for permanent injunction must also be dismissed. *See id.*; *Alliance Network, LLC v. Sidley Austin LLP*, 43 Misc. 3d 848, 866 (Sup. Ct. N.Y. Cty. 2014). "[P]ermanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted." *Weinreb*, 97 A.D.3d at 59 (citation

⁶ The only context in which a New York court will consider a conspiracy allegation is not as a cause of action, but as a theory of vicarious liability within another claim, "to connect the actions of separate defendants to an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (N.Y. 1986); *Hoag*, 246 A.D.2d at 230. However, Ginarte has failed to make such a pleading, nor has it described any specific actions undertaken by any specific individuals "to connect." As such, this limited context is not relevant here. In any case, all of Ginarte's other claims have fatal flaws warranting dismissal. *See, Jebran v. LaSalle Business Credit, LLC*, 33 A.D.3d 424, 425 (1st Dep't 2006) ("Since New York does not recognize a substantive tort of conspiracy and plaintiffs have not properly pleaded any other causes of action, the action was properly dismissed.")

and quotation marks omitted). As explained above, all of Ginarte's other claims suffer fatal flaws warranting dismissal, and, as such, its claim for permanent injunction cannot survive.

2. Ginarte Does Not Plead Continuous or Future Injury.

Ginarte's claim for permanent injunction is defective in other key respects. "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." *Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 596 (2d Dep't 2005). Ginarte cannot, however, establish as a matter of law that it has suffered a harm by losing clients, as "the client has the right to terminate the attorney-client relationship at any time with or without cause." *Majid & Assoc., P.C.*, 2012 WL 9515679, at *2; *see also*, *Lowenbraun v. Garvey*, 60 A.D.3d at 917. There are strong public policy grounds for allowing clients to substitute counsel where they choose to do so, and a "competitor who lawfully induces termination of a contract terminable at will commits no ethical violation and does not produce a result contrary to the expectations of the parties." *Koeppel*, 122 A.D.2d at 782 (reversing a preliminary injunction barring defendants from soliciting plaintiff law firm's clients).

Ginarte's allegations of Defendants' misconduct—which are vague, conclusory, and baseless—fail to adequately plead that there was a "result contrary to the expectations of the parties [to the retention agreements]," let alone an irreparable harm, where a client chose to substitute Schwitzer & Associates as counsel. *See id.* Indeed, Ginarte fails to plead any irreparable harm that would occur in the absence of a permanent injunction. *See, Pires v. The Bowery Presents, LLC*, 44 Misc.3d 704, 711 (Sup. Ct. N.Y. Cty. 2014) ("[Plaintiff] also fails to allege that she will suffer irreparable harm in the absence of injunctive relief.").

Nor has Ginarte provided "any factual matter from which it could be determined that [Defendants are] engaged in an ongoing practice of violating" its rights. *Id.* "Injunctive relief is designed to be prospective, and 'ordinarily should not be granted to operate on acts already

performed,” but may only be granted where there is present or continuing harm caused by a defendant’s ongoing conduct. *Id.* (quoting *Allen v. Pollack*, 289 A.D.2d 426, 427 (2d Dep’t 2001)). In *Pires*, this court found that where plaintiff alleged only that, “[defendant] ‘has engaged in a continuous practice of violating § 25.30(c) in substantially the same way’ as it violated the statute with respect to [plaintiff]; that this ‘unlawful practice continues to the present time’; and that defendant ‘will continue to violate § 25.30(c) in the future’ if it is not enjoined,” that, “[t]hese allegations amount to nothing more than conclusory statements, unsupported by any factual matter from which it could be determined that [Defendant] is engaged in an ongoing practice of violating the statute.” *Id.*

Ginarte alleges, in relevant part, “Defendants . . . have been soliciting and continue to solicit clients of Ginarte . . . ,” and that, “In its efforts to solicit Ginarte’s clients, Defendants . . . are misleading those clients,” and that, “Should Defendants . . . continue to solicit Ginarte’s clients in the manner set forth herein, they will be interfering with and/or damaging Ginarte’s business relations with its clients,” and that, “For the above reasons, the Court should issue a permanent injunction enjoining Defendants and their unnamed co-conspirators from having any further contact with Ginarte’s current or former clients.” Compl. ¶¶ 89; 93; 95; 96. As in *Pires*, Ginarte “does not allege any specific events in which [Defendants] threaten[] to violate” Ginarte’s rights. *Pires*, 44 Misc. 3d at 711. Therefore, Ginarte’s “threadbare assertion that [Defendants are] violating [its rights] in ‘substantially the same way’ is inadequate to serve as the basis for an injunction claim.” *Id.*

3. Ginarte Makes Only a Conclusory Claim that It Has No Remedy at Law.

Ginarte’s bare assertion that “Ginarte has no other adequate remedy at law for this cause of action,” Compl. ¶ 97, is conclusory and inadequate to support a cause of action for permanent injunction. Ginarte’s failure to plead a factual basis for an inference that Defendants continue or may continue to violate its rights such that an injunction is necessary, and its other pleadings, which are legal in nature, confirm that it is attempting to shoehorn an equitable remedy into what is, at bottom, a flawed

action at law. *See, e.g., Town of Liberty Volunteer Ambulance Corp. v. Catskill Regional Med. Ctr.*, 30 A.D.3d 739, 740–41 (3d Dep’t 2006) (dismissing claim for permanent injunction, noting, “considering the allegation that there was a tortious interference with contract, the legal remedy of damages is available”).

Because Ginarte has no valid substantive claims against Defendants, makes no allegation of irreparable harm in the absence of an injunction, fails to plead any facts giving rise to an inference of continued or threatened future violation, and has failed to demonstrate it has no remedies at law, its claim for permanent injunction fails.

IV. CONCLUSION

Because Ginarte has not stated a single valid cause of action against any of the Schwitzer Defendants, and because it is clear that this Complaint was brought solely to denigrate Schwitzer & Associates in the press, its Complaint must be dismissed with prejudice.

Dated: February 7, 2019
New York, NY

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Randy M. Mastro
Randy M. Mastro
Nancy E. Hart
RMastro@gibsondunn.com
NHart@gibsondunn.com

200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
*Attorneys for Defendants William Schwitzer,
William Schwitzer & Associates, P.C.,
Giovanni C. Merlino, Barry A. Semel-
Weinstein, and Beth M. Diamond*